Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

STUART KORTEBEIN, et al.
Petitioners

v.

AMERICAN MUTUAL LIFE INSURANCE CO. now known as
AMERUS LIFE INSURANCE CO.
Respondent

On Petition For A Writ Of Certiorari
To The Texas Court of Appeals, Third District, at Austin

PETITION FOR A WRIT OF CERTIORARI

TIM LABADIE
ATTORNEY AT LAW
Attorney for Petitioners

3355 BEE CAVE RD.,
SUITE 103
AUSTIN, TEXAS 78746
512.327.6697

7088

QUESTIONS PRESENTED FOR REVIEW

Petitioners were members of a class of persons and entities who complained, among other things, that AmerUs Life Insurance Co. made misrepresentations about vanishing premium whole life insurance policies. After the class action, which was pending in the 98th District Court of Travis County, Texas, settled and a judgment was rendered, Petitioners filed suit in state court in Illinois attacking the judgment, complaining that they were not adequately represented by class counsel. The Texas court enjoined Petitioners from proceeding with the Illinois action after AmerUs argued that Petitioners are bound by and cannot collaterally attack the judgment rendered by the Texas court.

Can Petitioners collaterally attack the class action judgment based upon a claim that they were not afforded their due process right to adequate representation by the class representative?

If Petitioners can collaterally attack the class action judgment based upon a claim that they were not afforded their due process right to adequate representation by the class representative, can they do so in a forum of their choosing?

PARTIES TO THE PROCEEDING

Petitioners are Stuart Kortebein, Antimo Candel, Ronald Peters, Thaddeus Pierce, Melvyn Romanoff, Fedor Bachman, William Baiunger, Charles Rhodes, Robert Babbin, Burton Eisenberg, Jeannette Page, David Rozen, Richard Hirschtritt, John Hoff, Martin Blumburg, Charles Earle, Albert Furman, Albert Furman Trust, Hubbanrd Page, Gerald Kandel, Max Rabin, Ian Haskell, Sharon Haskell, Saul Haskell, Marc Engelhart, Linda Weber, Harry Weber, Kevin Earle, Michael Tan, Steven Kroll, Keith Boyer, Robert Bussell, Donald Silvertrust, Howard Weitzman, Lewis Natenshon, Larry Goldsmith, Mitchell Nagorsky, Paul Adelman, Jacquelyn Scott, Vanessa Ehrlich, Sandford Gail, Mahammad Farooqui, Michael Hyman, and Barry Millman.

Respondent is AmerUs Life Insurance Company.

TABLE OF CONTENTS

Questions Presented i
Parties to the Proceeding ii
Table of Contents iii
Table of Cited Cases iv
Table of Appendices vi
Opinion Below 1
Statement of Jurisdiction 1
Constitutional Provision Involved 1
Statement of the Case 2
Reasons for Granting the Writ 4

I. A collateral attack upon a class action judgment is necessary to protect the constitutionality of the class action procedure 4

II. The Texas courts denied Petitioners the opportunity to adjudicate their claim under the Fourteenth Amendment to the United States Constitution that they were not adequately represented in the class action proceeding 4

III. The judgment of the Austin Court of Appeals is in conflict with the decision in *In re Real Estate Title and Settlement Services Antitrust Litigation*, 869 F.2d 760 (3d Cir.), *cert. denied*, 493 U.S. 821 (1989) 4

IV. The Questions presented are Important 12

Conclusion 12

TABLE OF CITED AUTHORITIES

Page

Cases:

Brown v. Ticor Title Insurance Co.,
982 F.2d 386 (9th Cir. 1992), *cert. dismissed as improvidently granted*, 511 U.S. 117 (1994) 8, 10

Burger King Corp. v. Rudzewicz,
471 U.S. 462 (1985) 5

Epstein v. MCA, Inc.,
179 F.3d 641 (9th Cir. 1999) 10, 11

Gonzales v. Cassidy,
474 F.2d 67 (5th Cir. 1973) 8, 9

Grimes v. Vitalink Communications Corp.,
17 F.3d 1553 (3rd Cir. 1994) 11, 12

Hansberry v. Lee,
311 U.S. 32 (1940) 5, 6, 7, 11

In re Real Estate Title and Settlement Services Antitrust Litigation,
869 F.2d 760 (3d Cir.), *cert. denied*,
493 U.S. 821 (1989) 4, 6, 7, 8, 9

Kortebein v. American Mutual Life Insurance Co.,
49 S.W.3d 79 (Tex. App.—Austin 2001, pet. denied) 1, 4, 9

Matsushita Electric Industrial Co., Ltd. v. Epstein,
516 U.S. 367 (1996) 10, 11

Nottingham Partners v. Trans-Lux Corp.,
925 F.2d 29 (1st Cir. 1991) 12

Cited Auth[illegible]s

Phillips Petroleum Co. v. Shutts,
472 U.S. 797 (1985) 5, 6

Sam Fox Publishing Co., Inc. v. United States,
366 U.S. 683 (1961) 5

Schlobohm v. Schapiro,
784 S.W.2d 355 (Tex. 1990) 4

Constitutions and Statutes:

U.S. CONST. amend. XIV 1, 4

28 U.S.C. § 1257(a) 1

28 U.S.C. § 1738 10

TEX. CONST. art. I, § 19 4

TEX. CIV. PRAC. & REM. CODE § 17.042 4

APPENDIX

Page

Appendix A — The opinion of the Texas Court of Appeals, Third District, at Austin dated May 12, 2001 ..... 1a

Appendix B — Letter from the Supreme Court of Texas dated August 23, 2001, denying Petitioners' petition for review 21a

Appendix C — Settlement Agreement made in Cause No. 95-11315; *Bruce C. Cozad and Wendy Cozad v. American Mutual Life Insurance Co.* (98th Judicial District Court of Travis County, Texas) 22a

Appendix D — Final Judgment in Cause No. 95-11315; *Bruce C. Cozad and Wendy Cozad v. American Mutual Life Insurance Co.* (98th Judicial District Court of Travis County, Texas) 99a

Appendix E — Second Amended Complaint filed in Cause No. 00 CH 00932; *Kortebein, et al. v. AmerUs Life Insurance Co., f/k/a American Mutual Life Insurance Co.* (Circuit Court of Cook County, Illinois) 109a

Petitioners respectfully petition for a writ of certiorari to review the judgment of the Texas Court of Appeals, Third District, at Austin in this case.

OPINION BELOW

The opinion of the Texas Court of Appeals, Third District, at Austin (App. A) is reported at *Kortebein v. American Mutual Life Insurance Co.*, 49 S.W.3d 79 (Tex. App.—Austin 2001, pet. denied).

STATEMENT OF JURISDICTION

The judgment of the Austin Court of Appeals was rendered on May 10, 2001. The Supreme Court of Texas denied Petitioners' petition for review on August 23, 2001. (App. B).

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISION INVOLVED

This case involves the due process rights afforded under the Fourteenth Amendment to the United States Constitution, which provides:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to

any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On August 31, 1995, Bruce and Wendy Cozad filed a class action against AmerUs complaining that misrepresentations were made about whole life insurance policies purchased from AmerUs, including the representation that after a certain number of premiums were paid, no more premiums would be due (a "vanishing premium"). The members of the class, which included Petitioners, were policyholders throughout the United States. None of the Petitioners were the class representatives.

On May 23, 1997, the Cozads and AmerUs entered into a Settlement Agreement, which released all of the class members' claims against AmerUs and gave the class members the option of seeking basic relief (reduced rate policy loans, new policy contributions, and new annuity contributions) or special relief (App. C). In order to obtain special relief, a class member had to submit to a claim process whereby the class member would submit documentation to AmerUs supporting the misrepresentation claim. AmerUs would decide the merits of these claims, with an appeal solely to an "Independent Arbiter" selected by AmerUs and the class representatives. If special relief were sought, and denied, the class member could not obtain basic relief, nor did he or she have any further appeal.

On September 16, 1997, the Texas court approved the settlement and rendered a final judgment in the class action (App. D). This judgment incorporated the settlement agreement, which provided that the court would have exclusive jurisdiction over and venue of any actions relating

to the settlement agreement. The judgment itself provides that the court retains jurisdiction over the settlement. The judgment, like the settlement agreement, also provides that the class members released all their claims against AmerUs relating to the vanishing premium whole life insurance policies. As members of a nationwide class, Petitioners did not have any input into the terms of the settlement agreement. Instead, counsel for the class representatives and AmerUs "worked closely together in drafting, negotiating, and reviewing this Settlement Agreement."

After the final judgment was rendered, Petitioners applied for, but were denied, special relief even though the terms of their policies had been misrepresented to them. Subsequently, Petitioners jointly filed a lawsuit in Cook County, Illinois, seeking to pursue their individual claims against AmerUs concerning the alleged misrepresentations that were made to induce them into purchasing the vanishing premium life insurance from AmerUs. By that suit, Petitioners sought to avoid the class action judgment, claiming that their constitutional due process rights were violated because of inadequate representation by the class representatives that created a claim procedure that was designed to provide no relief at all (App. E).

In response to the Illinois suit, AmerUs filed a Motion to Enforce Judgment in the Texas court, asking the trial court to enjoin Petitioners from proceeding with the Illinois lawsuit, claiming that Petitioners are bound by and cannot collaterally attack the judgment rendered by the Texas court in the class action proceeding. Petitioners responded, subject to their special appearance, arguing that the Texas court had no jurisdiction over them and thus, no power to determine the merits of their contention that they were not afforded the due process protection of adequate representation in the class action. The Texas court granted

AmerUs' motion and enjoined Petitioners, thereby denying, by implication, Petitioners' special appearance. The Austin court of appeals affirmed, concluding that Petitioners' due process rights had not been infringed upon because they had been adequately represented by class counsel. *Kortebein v. American Mutual Life Insurance Co.*, 49 S.W.3d 79 (Tex. App.—Austin 2001, pet. denied). The Texas supreme court, on August 23, 2001, denied Petitioners' petition for review.

REASONS FOR GRANTING THE WRIT

I. A collateral attack upon a class action judgment is necessary to protect the constitutionality of the class action procedure.

II. The Texas courts denied Petitioners the opportunity to adjudicate their claim under the Fourteenth Amendment to the United States Constitution that they were not adequately represented in the class action proceeding.

III. The judgment of the Austin Court of Appeals is in conflict with the decision in *In re Real Estate Title and Settlement Services Antitrust Litigation*, 869 F.2d 760 (3d Cir.), *cert. denied*, 493 U.S. 821 (1989).

For the class action judgment to be binding on Petitioners, none of whom are Texas residents, the Texas court had to have personal jurisdiction over them. A Texas court can exercise personal jurisdiction over a nonresident if: (1) the Texas long-arm statute authorizes the exercise of jurisdiction, and (2) the exercise of jurisdiction comports with state and federal constitutional guarantees of due process. *Schlobohm v. Schapiro*, 784 S.W.2d 355, 356 (Tex. 1990); *see also* U.S. CONST. amend. XIV; TEX. CONST. art. I, § 19; TEX. CIV. PRAC. & REM. CODE § 17.042.

Typically, the issue of personal jurisdiction focuses on a nonresident defendant, requiring that defendant to purposely establish minimum contacts with the forum state before personal jurisdiction can be exercised over him or her. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475-76 (1985). However, as this Court has held, the Fourteenth Amendment protects "persons", not "defendants" and thus, Petitioners were entitled to due process protections from the Texas court that sought to adjudicate their claims. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811 (1985).

One such protection is that the absent members must be adequately represented at all times by the class representative. *Hansberry v. Lee*, 311 U.S. 32, 42- 43 (1940). In *Hansberry*, several class members argued that they were not bound by a class action judgment because they were not parties to the lawsuit. The Court held that the general rule requiring a person to be a party to litigation before a judgment would be binding on that person does not apply to the members of a class so long as parties who are present adequately represent those absent members. *See also Sam Fox Publishing Co., Inc. v. United States*, 366 U.S. 683, 691 (1961) ("the judgment in a class action will bind only those members of the class whose interests have been adequately represented by existing parties to the litigation").

This Court in both *Shutts* and *Hansberry* held that the consequence of not providing the due process protections to the absent class members is that the judgment rendered in the class action suit will not be binding on them. *Shutts*, 472 U.S. at 811; *Hansberry*, 311 U.S. at 42-43. However, the Court did not directly address in these cases, nor any other case, the issue of whether absent class members can collaterally attack a class action judgment based on claimed

due process violations.[1] As a result, the resolution of this issue has been left to lower courts, with conflicting results.

The approach more consistent with protecting the due process rights of absent class members is exemplified by the Third Circuit which, relied on *Shutts* and *Hansberry* to hold that class members who have not been afforded adequate due process protections can collaterally attack the class action judgment in the forum of their choosing. *In re Real Estate Title and Settlement Services Antitrust Litigation*, 869 F.2d 760, 767-769 (3d Cir.), *cert. denied*, 493 U.S. 821 (1989).

The facts of *In re Real Estate* are very similar to the facts in this case. *In re Real Estate* grew out a class action filed in a Pennsylvania federal court against several title insurance companies. After the class action settled, the attorney general of Arizona (representing two Arizona school boards that were members of the class) filed suit in Arizona state court against the title insurers alleging the same claims that were the subject of the class action. The title insurers convinced the Pennsylvania federal court to enjoin the Arizona action, just as the trial court did in this case, and the Arizona school boards appealed, claiming they were not bound by the class action judgment because they were not afforded the due process protections of the opportunity to opt out and adequate representation. *In re Real Estate*, 869 F.2d at 765.

The Third Circuit reversed the injunction, holding that, in light of *Hansberry* and *Shutts*, the consequence of not providing due process protections to the absent class members is that the judgment rendered in the class action

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[1] While *Hansberry* was a collateral attack, the issue of whether a collateral attack is permissible was not raised by the parties and not addressed by the Court.

suit is not binding on those members. *In re Real Estate*, 869 F.2d at 767-69. Significantly, the Third Circuit reversed the injunction, not because it determined that due process protections had not been given to the absent class members, but simply because that was what the absent class members were alleging. Indeed, the Third Circuit allowed the school boards to collaterally attack the class action judgment.

Not only did the Third Circuit permit a collateral attack upon the class action judgment, it held that the class members' due process claim could be brought in the forum of their choosing, holding as follows:

> Thus, the class members in *Shutts* still possessed their right to attack the class action judgment collaterally, presumably in the forum of their choice, alleging that the representative plaintiff did not represent them adequately.
>
> . . .
>
> It will be for the Arizona court to determine the merits of the due process contentions. If that court finds that the school boards were accorded due process in the class action proceeding, then the state court suit will be prohibited by the terms of the settlement.
>
> *In re Real Estate*, 869 F.2d at 767, 769.

The Third Circuit saw no danger to the class action system by allowing collateral attacks in other forums, holding:

> Ever since *Hansberry v. Lee* was decided in 1940, collateral attacks have been considered to be a necessary part of the class action scheme. Rather than threatening the vitality

> of the class action mechanism, the fact that some plaintiffs will be able to extricate themselves from class action judgments if subsequent courts find them to be inadequately represented is integral to the constitutionality of the class action procedure.
>
> *In re Real Estate*, 869 F.2d at 769.

The Third Circuit is not the only court to permit a collateral attack upon a class action judgment based on an allegation that the absent class members were not adequately represented by class counsel. The Ninth Circuit permitted the same when numerous Arizona and Wisconsin consumers filed their own class action in Arizona federal court after the same Pennsylvania class action that was the subject of *In re Real Estate* was settled. *Brown v. Ticor Title Insurance Co.*, 982 F.2d 386, 392 (9th Cir. 1992); *cert. dismissed as improvidently granted*, 511 U.S. 117 (1994).

In *Brown*, rather than trying to enjoin the consumers, the insurers instead argued the consumers were bound by the Pennsylvania class action judgment and their claims were barred by res judicata. On appeal of a summary judgment in favor of the insurers, the consumers argued they were not bound by the Pennsylvania class action judgment because they were not afforded the due process protections of adequate representation and the opportunity to opt out. *Brown*, 982 F.2d at 390, 392. The Ninth Circuit reversed and remanded because the Pennsylvania court had not given the consumers the opportunity to opt out of the class action, but it found that the consumers had not provided any evidence of inadequate representation. *Brown*, 982 F.2d at 391, 392. Thus, the court permitted the

absent class members to collaterally attack the class action judgment in the forum of their choosing.

This principle is also implicit in *Gonzales v. Cassidy*, 474 F.2d 67 (5th Cir. 1973), as the court permitted absent class members to collaterally attack a class action judgment based on a contention that the class representative did not adequately represent them. The class action was filed in the district court for the Western District of Texas while the second suit was filed in the district court for the Northern District of Texas. The Fifth Circuit reversed the Northern District Court's summary judgment based on res judicata, holding that the absent members were not bound by the first judgment because the class representative did not, at all times, adequately represent them. *Gonzales v. Cassidy*, 474 F.2d at 74.

The Austin court of appeals found *In re Real Estate* inapplicable, claiming that the Third Circuit permitted a collateral attack only because the Arizona school boards were not given the opportunity to opt out of the class action settlement. *Kortebein*, 49 S.W.3d at 87. Even if this were true, and it is not, the Austin court's reasoning is seriously flawed as it gives more importance to one due process protection over another when all such protections are of equal importance. Consequently, if any of the due process protections are not afforded to absent class members, then the class action judgment is not binding on them. Moreover, the Arizona school boards, similar to Petitioners, also asserted that the class representatives "sold them out by agreeing to a settlement that included no direct monetary relief." *In re Real Estate*, 869 F.2d at 765, n.2.

Similarly, Petitioners should be permitted to adjudicate their due process claim in the Illinois court – a court that clearly has jurisdiction over them. If that court determines

that Petitioners were adequately represented in the class action, then the judgment is binding on them. If, however, the Illinois court determines that Petitioners were not adequately represented, then they can continue to proceed with their claims against AmerUs in a forum that has jurisdiction over them. Allowing the Texas court to adjudicate Petitioners' due process claim can lead to only one conclusion: that they were adequately represented. A contrary decision would have no binding authority since the consequence of such a decision would be that the Texas court has no jurisdiction over Petitioners.

In contrast to the Third, Fifth and Ninth Circuit's opinion in *Brown*, the Ninth Circuit, in dicta, in *Epstein v. MCA, Inc.*, 179 F.3d 641 (9th Cir. 1999), stated that collateral attacks upon class action judgments are not permissible, even when raising due process claims. *Epstein* was the opinion on remand after this Court decided *Matsushita Electric Industrial Co., Ltd. v. Epstein*, 516 U.S. 367 (1996).

After Matsushita acquired the stock of MCA in a tender offer, the holders of MCA's common stock filed a class action in Delaware state court, alleging state law claims against MCA and Matsushita. While that class action was pending, the shareholders brought suit in a California federal court against Matsushita alleging a federal claim under the Securities Exchange Act. The federal district court declined to certify a class and rendered summary judgment for Matsushita. While the federal action was on appeal at the Ninth Circuit, the Delaware class action was settled and all federal law claims in addition to the state law claims were released. Matsushita then argued to the Ninth Circuit that it must give full faith and credit to the Delaware judgment and dismiss the appeal. The Ninth Circuit held that the Full Faith and Credit Act, 28 U.S.C. § 1738, did not apply.

This Court granted certiorari and addressed one issue: whether a federal court may withhold full faith and credit from a state court judgment approving a class action settlement simply because the settlement releases claims within the exclusive jurisdiction of the federal courts. *Matsushita*, 516 U.S. at 369. In resolving this issue, the Court considered whether Delaware law would give preclusive effect to the judgment, *Matsushita*, 516 U.S. at 375, not whether due process protections were afforded the absent class members. Indeed, the Court specifically declined to address the due process claim, "because it is outside the scope of the question presented in this Court." *Matsushita*, 516 U.S. at 379, n. 5.

Even though this Court stated it was not addressing the due process claim, the majority of the Ninth Circuit, on remand, refused to consider the merits of this argument, claiming that this Court had concluded that the Delaware judgment did not violate due process. *Epstein v. MCA, Inc.*, 179 F.3d 641, 644-45 (9th Cir. 1999). Judge Thomas dissented on this issue because this Court had specifically stated that it had not addressed the due process issue since it was not a basis for the Ninth Circuit's decision that it was reviewing. *Epstein*, 179 F.3d at 651-52 (Thomas, J., dissenting).[2]

Even though the Ninth Circuit majority refused to consider the merits of the due process claim, it stated in

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[2] Judge Thomas further cited Justice Ginsburg's partial concurrence in *Matsushita*, that, "Although the Ninth Circuit decided the case without reaching the due process check on the full faith and credit obligation, that inquiry remains open for consideration on remand." *Epstein*, 179 F.3d at 651-52 (Thomas, J., dissenting), quoting *Matsushita*, 516 U.S. at 389.

dicta that due process, while it requires that the absent class members be adequately represented "does not require collateral second-guessing of those determinations and that review." *Epstein*, 179 F.3d at 648. The Ninth Circuit seemingly relied upon *Hansberry v. Lee*, 311 U.S. 32 (1940) for this conclusion, which is surprising since *Hansberry v. Lee* was a successful collateral attack upon a class action judgment.

The Ninth Circuit majority also cited as support for its conclusion *Grimes v. Vitalink Communications Corp.*, 17 F.3d 1553 (3rd Cir. 1994) and *Nottingham Partners v. Trans-Lux Corp.*, 925 F.2d 29 (1st Cir. 1991). Neither case, however, is applicable to the facts of this case. In both cases, class members were not allowed to collaterally attack a class action judgment because the basis for the attack (inadequate representation in *Grimes* and unfair settlement terms in *Nottingham Partners*) had been raised by the class members in the class action suit and resolved against them not only by the trial court but also by courts of appeals. *Grimes*, 17 F.3d at 1558; *Nottingham Partners*, 925 F.2d at 31. Petitioners, of course, did not raise inadequate representation in the class action lawsuit nor has this issue been resolved against them.

IV. The Questions presented are Important

While this Court has held that absent class members are entitled to certain due process protections before a class action judgment will be binding on them, the Court has yet to directly address whether the absent class members can assert their due process rights in a collateral attack to the class action judgment and whether can they do so in a forum of their choosing that has jurisdiction over them. Thus, there are mixed results among state and federal courts. With this case, the Court has the opportunity to

definitively resolve these issues that can affect potentially millions of litigants involved in class actions throughout our nation.

CONCLUSION

The due process requirements of the Fourteenth Amendment demand that Petitioners be afforded adequate representation by the class representatives in the settlement of the class action suit against AmerUs. The Court should permit absent class members to challenge by collateral attack a class action judgment based upon claims that their due process rights were violated in order to maintain the constitutionality of the class action procedure.

The Texas courts, however, denied Petitioners the right to raise and adjudicate their claim that they were not afforded this constitutional protection by enjoining them from prosecuting their suit in Illinois. Such trampling upon Petitioners' constitutional rights can now only be remedied by this Court's reversal of the injunction.

Accordingly, Petitioners, for the reasons set forth above, respectfully request that the Court grant this petition for writ of certiorari.

Respectfully submitted,

TIM LABADIE
LAW OFFICE OF TIM LABADIE
Attorney for Petitioners
3355 Bee Cave Rd., Suite 103
Austin, Texas 78746
(512) 327.6697